RECENT CASES.

ADMINISTRATOR—ANCILLARY—DECEDENT'S ESTATES—PROBATE COURT.—LEWIS ET AL., V. RUTHERFORD, 72 S. W. 373 (ARK.)—Where an ancillary administrator is appointed to care for a decedent's insolvent estate in a jurisdiction other than that of the decedent's domicile, *held*, it is his duty to pay over to the principal administrator enough to allow all creditors to share alike.

This decision seems to prescribe the proper course to be followed by administrators. *Dawes v. Head*, 3 Pick. 128. Some authorities hold that it is the duty of the ancillary administrator to satisfy the claims of the creditors of the State in which he is appointed to the full extent of assets obtainable and only the surplus is to be paid over to the principal estate. This latter view is supported by the United States Supreme Court, *Smith v. Bank*, 5 Pet. 518, 527. Whether the court should decree a distribution or remit the assets to the principal administrator is a matter of discretion. *Fretwell v. McLemore*, 52 Ala. 124.

ALIENS—NON-RESIDENT—DEATH BY WRONGFUL ACT—RIGHT OF ACTION.—BONTHRON ET UX. V. PHOENIX LIGHT AND FUEL CO., 71 PAC. 941 (ARIZ.).—The Arizona statute giving a right of action to parents for the wrongful death of their son does not expressly or impliedly exclude non-residents or aliens from its benefit. *Held*, that residents of Canada may bring an action thereunder.

The general rule is that non-residents may sue. *R. Co. v. Glover*, 92 Ga. 132; *Philpott v. R. Co.*, 35 Mo. 164; *R. Co. v. Higgins*, 85 Tenn. 620; *R. Co. v. Mills*, 57 Kan. 687. This has been held not to apply to a non-resident mother who was an alien, on the ground that no legal liability existed which made it her son's duty to support her. *Deni v. R. Co.*, 181 Pa. St. 525. See also *Brannigan v. Union Gold Mining Co.*, 93 Fed. 164. The doctrine of these latter cases has been recently disputed in Massachusetts. *Vetaloro v. Perkins*, 101 Fed. 393; *Mulhall v. Fallon*, 176 Mass. 266. In England each view has been recently upheld. *Adam v. B. & F. S. S. Co.*, 2 Q. B. 430; *Davidson v. Hill*, 70 L. J. Q. B. 788. Under a special act giving a right of action to those injured by a death caused by a riot or lynching, it has been held that a British citizen could sue, the decision being based largely upon the ground that the purpose of the statute was the suppression of murder, and that this could not be accomplished if a distinction were made against aliens. *Luke v. Calhoun County*, 52 Ala. 115. See also discussion in 54 L. R. A. 935.

BANKRUPTCY—LIEN—SALE WITHIN FOUR MONTHS PERIOD.—CLARKE V. LARREMORE, TRUSTEE, 9 AM. B. R. 476, U. S. SUP. CT., FEB. 1903.—*Held*, that proceeds of a sheriff's sale held within four months prior to filing a petition in bankruptcy became subject to the control of the trustee in bank-

ruptcy where judgment, execution and levy were all within four months period. White, J. and Peckham, J., *dissenting.*

By Section 67 (*f.*) of the Bankruptcy Act, liens such as the one giving rise to the proceeds in question, are rendered null and void "in case the judgment debtor is adjudged a bankrupt." This decision of the Supreme Court defines this section to include the proceeds in the hands of the sheriff. "The invalidity relates back to the entry of the judgment and effects all subsequent proceedings." The money in the sheriff's hands takes the place of the property. *Balmer v. Balmer,* 2 Lanc. Law Review, 11. "The rights of the creditor were still subject to interception," and the proceeds do not become his until paid over. *Baker v. Kenworthy,* 41 N. Y. 215. That the money in the sheriff's hands is "in custodia legis" and not subject to levy is almost universally held. *Turner v. Fendall,* 1 Cranch 116; *Conover v. Ruckman,* 32 N. J. Eq. 685; *Hardy v. Tilton,* 68 Me. 195, and note. The provision in the section in question excepting bona fide purchasers only from its operation would seem to lead to a like conclusion. *In re Franks,* 95 Fed. 635. But the Supreme Court of New York, App. Div., held in a recent case that where the money was paid over it did not come within Section 67 (f.). *Levor v. Leitor,* 8 Am. B. R. 459. The dissent was apparently in accordance with this view and with certain recent New York decisions holding that property in the sheriff's hands belongs to the creditor. *Wehle v. Conners,* 83 N. Y. 231.

BANKS—AUTHORITY OF CASHIER—LIABILITY OF BANK.—TAYLOR V. COMMERCIAL BANK, 66 N. E. 726 (N. Y.)—*Held,* that in the absence of authorization, the cashier of a bank has no authority by virtue of his position to make any representation on behalf of the bank as to the solvency of a customer who is one of its debtors. Bartlett, O'Brien, and Vann, JJ., *dissenting.*

The rule is laid down in the lower court, 73 N. Y. Supp. 929, and supported by the dissenting opinion that a principal is liable to a third person for the fraud of his agent, perpetrated by the latter in the course of his employment, although the act was *ultra vires,* and the principal did not know of it. On the doctrine of *ultra vires* the decisions are conflicting. See cases cited in *Nowac v. Railroad Co.,* 166 N. Y. 44. Several recent cases seem to treat the misrepresentations of a cashier as governed by principles different from those applicable to other classes of agents. *Crawford v. Boston Store Mercantile Co.,* 67 Mo. App. 39; *First Nat. Bk. v. Marshall and Ilsey Bk.,* 83 Fed. 725. *Swift v. Jewsbury,* L. R. 9 Q. B. 301, cited by the dissenting judges does not appear to support their opinion. See also *Barwick v. English Joint Stock Bank,* L. R. 2 Exch.259. The majority opinion is in accord with the weight of authority. *American Surety Co. v Pauly,* 170 U. S. 133; *Mapes v Sec. Nat. Bk.,* 80 Pa. 163; *Horrigan v. First Nat. Bk.,* 56 Tenn. 137.

BOUNDARIES—RIVERS—STATES—CONCURRENT JURISDICTION.—ROBERTS V. FULLERTON, 93 N. W. 1111 (WIS.).—An officer from Minnesota, acting under the laws of that State, seized plaintiff's fish net staked to the bottom of the Mississippi River on the Wisconsin side. In an action for damages, *held,* that the concurrent jurisdiction given by Congress over the

boundary waters between Wisconsin and Minnesota does not imply concurrent ownership in the land under the water, or in the fish and game inhabiting the same, but applies only to persons or things connected with navigation. Dodge, J., *dissenting.*

Sovereign rights as regards ownership of the bed of the Mississippi River coincide with territorial boundaries. Therein the jurisdiction of each State is exclusive. Concurrent jurisdiction does not empower one State to extend its police power over the territory of another, regulating the sovereign property right of the latter to the fish therein. The concurrent jurisdiction provided for the adjoining States attaches to cases arising out of the commerce of the river but does not authorize the courts of a State to abate a nuisance in the river beyond the boundary line of that State. *Gilbert v. Mfg. Co.,* 19 Iowa 319; *Buck v. Ellenbolt,* 84 Iowa 394. Dodge, J., dissenting, suggests that there is no distinction between criminal and police legislation of the State addressed to the subject of catching fish, and police or criminal legislation relating to other subjects.

CIVIL RIGHTS—PLACE OF PUBLIC ACCOMMODATION—BOOTBLACK STAND.—BENKS V. BESSO, 81 N. Y. SUPP. 384.—Under Laws of New York, 1895, c. 1042, which provide that all persons shall be entitled to equal accommodations of hotels, barber shops, theaters, "and other places of public accommodation or amusement," the proprietor of a boot-black stand was *held* liable for the penalty imposed for breach of the above, because of his refusal to black the plaintiff's boots on account of his color. *Nash and McLennan, JJ., dissenting.*

An unlicensed billiard parlor is not a "place of public amusement or accommodation," *Commonwealth v. Sylvester,* 95 Mass. 247; neither is a drug store. *Cecil v. Green,* 161 Ill. 265. A skating rink has been held within the statute, *People v. King,* 110 N. Y. 418; but see *Bawlin v. Lyon,* 67 Ga. 536.

CONSTITUTIONAL LAW—REGULATING THE RATE OF WAGES—CLASS LEGISLATION.—STREET V. VARNEY ELECTRICAL SUPPLY CO., 66 N. E. 895 (IND.).—The minimum wage law of Indiana enacts that unskilled labor employed on any public work of the State or of any political division thereof shall receive not less than twenty cents an hour. *Held,* unconstitutional, in that by its agency a citizen may be deprived of his property without due process of law; and also, inasmuch as it applies only to "unskilled labor," it is class legislation.

Legislation of this kind has received no favor in the courts. In *People v. Coler,* 166 N. Y. 1, a statute providing that all laborers upon any public work should be paid "not less than the prevailing rate of wages," was held unconstitutional, and the court held broadly that the legislature has no more right to interfere and control by compulsory legislation the action of municipal corporations with respect to contract rights of exclusively local concern, than it has to attempt to regulate the question of wages as between private citizens. In *State v. Norton,* 5 Ohio N. P. 183, a city ordinance enacting that laborers should receive not less than $1.50 per day, was held unconstitutional.

CONTRACTS—LEGALITY—RESTRAINT OF COMPETITION.—NATIONAL ENAMELING AND STAMPING CO. v. HABERMAN, 120 FED. 415.—*Held,* that a restrictive covenant which was ancillary to the main lawful contract and was reasonable might be enforced although unlimited in time and covering the United States in area.

The reasons for avoiding contracts in restraint of trade as against public policy have practically disappeared; yet the courts generally decline to enforce such contracts. *Telegraph Co. v. Crane,* 160 Mass. 50. There is no hard and fast rule as to what contracts are void as being in restraint of trade, but each case must be judged according to its own facts and circumstances. The true test would seem to be to consider what is reasonably essential to the protection of the purchaser; and whether, considering the vast area of some trades and the changed conditions of business, a contract, even in general restraint of trade, should be pronounced against public policy, if such restraint is reasonably necessary for the protection of the purchaser, *Quaere. Potteries Co. v. Oliphant,* 58 N. J. Eq. 507; *Watch Co. v. Roeber,* 106 N. Y. 473.

CRIMINAL LAW—INFORMATION—AMENDMENT.—STATE v. BARRELL, 54 ATL. 183 (VT.).—*Held,* that an information filed by a state's attorney may be amended by his successor in office, on leave of the court in which the information was filed.

This is apparently the first time this point has been decided. There is an expression assuming such to be the case in *State v. Meacham,* 67 Vt. 707, but no grounds therefor are stated. In *People v. Henssler,* 48 Mich. 49, it was held that in the absence of the prosecuting attorney the assistant prosecutor must necessarily have power with leave of court to make amendments. In the English case of *Attorney Gen. v. Henderson,* 3 Anstr. 714. the Solicitor General was permitted to amend an information filed by the Attorney General, but in this case the same man successively held both offices. The ground of the present decision is that the state's attorney's oath is for the faithful performance of his duties, and is not an oath to the truth of the matters in the information, so as to bar an amendment by a successor in office.

DIVORCE—ALIMONY—AVOIDANCE BY SUBSEQUENT MARRIAGE.—STATE EX REL. BROWN v. BROWN, 72 PAC. 86 (WASH.).—*Held,* that a divorced husband, after remarriage, cannot relieve himself from the payment of alimony on the ground of the increase of his expenses. Fullerton, C. J., and Anders, J., *dissenting.*

Courts should be slow in the granting of a change of alimony. *Barrett v. Barrett,* 41 N. J. Eq. 139; *Thurston v. Thurston,* 38 Ill. App. 464; and will consider whether the changed circumstances have been brought about by improper conduct. *Fisher v. Fisher,* 32 Iowa 20. There may be a reduction where the husband's faculties or resources have been impaired or reduced. *Cox v. Cox,* 3 Add. Ec. 276; *Davies v. Davies,* 4 S. & T. 228; *State v. Dist. Ct.,* 14 Mont. 396. An increase of his resources will justify an increase of alimony. *Otway v. Otway,* 2 Ph. 109; *Middleberger v. Middleberger,* 12 Daly (N. Y.) 195. The fact that the husband's income has been reduced by unprofitable speculation has been held no ground for

a proportionate reduction of alimony. *Neil v. Neil,* 4 Hag. Ec. 273. But the propriety of this decision is questioned by Bishop. *Marr. and Div.,* Sec. 430. And an increase through speculation has been taken as a basis for increase of alimony. *Graves v. Graves,* 108 Mass. 314. Remarriage in defiance of the decree of divorce and resulting inability to pay is no defence in a proceeding for contempt for non-payment. *Ryer v. Ryer,* 33 Hun 116.

JUDGMENT—JOINT—PAYMENT BY ONE JUDGMENT DEBTOR—CONTRIBUTION —DELESHAW ET AL. V. EDELEN, 72 S. W. 413 (TEX.).—Judgment had been rendered against three joint makers of a note. One of them paid the entire sum due, and took an assignment of the judgment, it being the intention of the parties to the transfer that the judgment be kept alive. *Held,* the judgment was nevertheless extinguished.

The court, in reaching this conclusion felt obliged to follow previous decisions of the state, although itself approving the contrary position. While cases are to be found which hold that the intention of the parties to the assignment controls—*Campbell v. Pope,* 96 Mo. 468,—the prevailing rule undoubtedly accords with this decision. *Black, Judgments,* Sec. 995.

MASTER AND SERVANT—DEFECTIVE APPLIANCES—KNOWLEDGE OF DEFECT —PROMISE TO INDEMNIFY—FORM OF ACTION.—OBANHEIM V ARBUCKLE, 81 N. Y. SUPP. 133.—A servant was injured by a defective tool which his employer had promised to repair shortly and in the meanwhile to indemnify him for any injury sustained therefrom. *Held,* that any action by the servant for the injury must be in tort for negligence and not on the promise. Woodward, J. *dissenting.*

In New York a promise to repair by the employer whereby the servant is induced to remain in the employment does not waive the employer's right to assert the defense that the servant has assumed all the obvious risks of his employment: *Marsh v. Chickering,* 101 N. Y. 396; *Hannigan v. Smith,* 28 App. Div. 176; *Rice v. Eureka Paper Co.,* 70 App. Div. 336; at least down to the time when the repairs are to be made. *Rice v. Eureka Paper Co., supra.* But this is not the general rule. *Hough v. Ry.,* 100 U. S. 213; *Ferriss v. Berlin Machine Works,* 90 Wis. 514; *Lyttle v. Ry.,* 84 Mich. 289; *Cooley, Torts,* 559-560. The case decided above would seem to be more in accord with previous New York decisions and especially *Rice v. Eureka Paper Co., supra,* if it had been held that while the additional promise that the plaintiff should "be taken care of" did not affect the defendant's defense any more than the mere promise to repair would, still, where there is such an additional promise the injured party might recover on it the full amount of his loss. No authority directly in point has been found, but see *dicta* in *Rice v. Eureka Paper Co., supra,* at p. 353.

MONOPOLIES—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE— CONSTITUTIONAL RIGHT OF PRIVATE CONTRACT LIMITED BY INTERSTATE COMMERCE CLAUSE.—U. S. V. NORTHERN SECURITIES CO., 120 FED. 721.—A holding company was incorporated for the purpose of holding the majority stock of two competing railroads. *Held,* that any contract or combination by which the majority of the stock of two competing interstate railroads is transferred to a corporation authorized to hold and vote for

the same, substantially restricts interstate commerce, and Congress may in the exercise of the power given by the commerce clause of the constitution, prohibit such contracts.

It is well settled that the Sherman Act is intended to prevent all direct restraint upon interstate commerce of any description whatever and without regard to the reasonableness of the restraint sought to be imposed. *U. S. v. Freight Ass'n,* 166 U. S. 290; *Addyston Pipe Co. v. U. S.,* 175 U. S. 211. This decision extends the operation of the Act by determining more specifically what combinations are in restraint of interstate commerce. Where a third party acquires a majority of the stock of two competing interstate railroads the restraint of interstate commerce is accomplished as effectually as though the two railroads were consolidated under a single charter. It is immaterial that the third party is a corporation. The general language used indicates an intention to comprehend every scheme that might be devised to accomplish that end.

MUNICIPAL CORPORATIONS—QUO WARRANTO—LACHES.—STATE EX REL. JACKSON V. TOWN OF MANSFIELD ET AL., 72 S. W. 471 (Mo.).—A city was not legally organized but was permitted to use its franchises for eight years. The State sought by quo warranto proceedings to deprive the town of its franchises and privileges to exist as a city. *Held,* the State was precluded by its laches.

Laches is not imputable to the government in its character as a sovereign. *United States v. Kirkpatrick,* 9 Wheat. 720, 735. Following this doctrine it would seem that a Statecould not be precluded by its laches. Yet a municipal corporation may exist by prescription. *Jameson v. People,* 16 Ill. 257. This fact shows that a State may be precluded from an information to deprive a city of its franchises, but on the ground of *acquiesence,* rather than *laches. State v. Leatherman,* 38 Ark. 81, 90.

PATENTS—RIGHT TO EQUITABLE RELIEF AGAINST INFRINGEMENT—IMMORAL USE.—FULLER V.BERGER ET AL., 120 FED 274.—The plaintiff, assignee of the inventor, used a patented device for detecting bogus coins in its gambling machines. The defendants without license applied it to gambling machines of their own make. *Held,* that the use which the owner of a patent makes of the invention can not affect his right to an injunction. Grosscup, Circuit J. *dissenting.*

What the complainant is doing with his property cannot deprive him of his right to invoke the protection of the court against infringement. *Saddle Co. v. Troxel,* 98 Fed. 620. Courts of equity will not refuse redress to the suitor because his conduct in other matters not then before the court may not be blameless. *Paper Co. v. Robertson,* 99 Fed. 985. There are, however, contrary decisions. Where a device is capable of being used for some useful purpose but in reality is used only for gambling purposes, the injunction will be denied. *Novelty Co. v. Dworzek,* 80 Fed. 902. The dissenting opinion is that though the claimant may hold a legal title, the court is under no compulsion of law to issue the writ. so long as sound considerations of public morals and conscience forbid.

PRIVATE CORPORATIONS—ILLEGAL ISSUE OF STOCK—INJUNCTION.—KRAFT V. GRIFFON CO. ET AL., 81 N. Y. SUPP. 438.—Under a statute declaring that nothing but money shall be considered as payment of any part of the capital stock

of a corporation, *held*, that an issue by a corporation of bonus stock to induce the purchase of bonds, may be restrained at the suit of a stock-holder, although the capital stock of the corporation was so impaired that the market value of bonds and bonus was covered by payment of the par value of the bonds alone.

The common law rule that such a sale was valid in the case of a "going concern" when made bona fide for the purpose of continuing business. *Handley v. Stutz*, 139 U. S. 417, was not followed because of the express provision in the N. J. Stock Corp. Law (P. L. 1896, p. 293) which had been construed in *Donald v. American Ice Co.*, 62 N. J. Eq. 729. In *Memphis Ry. v. Dow*, 120 U. S. 287, the court held that the object of a similar statute was "to protect the stockholders from spoilation and to guard the public against securities that were absolutely worthless" and allowed a bonus stock issue. See also *Peoria etc. Ry. v. Thompson*, 103 Ill. 187, 201; *Stein v. Haward*, 65 Cal. 616, the latter being directly in point. For a general criticism of similar statutes see *Elliott, Priv. Corp.*, sec. 342.

PRIVATE CORPORATIONS—MANAGEMENT—RESIGNATION OF DIRECTORS.—ZELTNER V. ZELTNER BREWING CO. 66 N. E. 810 (N. Y.)—All the officers of a corporation resigned for the purpose of enabling one of them to apply for a receiver on the ground that the corporation was without officers to preserve its assets. *Held*, that such proceedings were unlawful as tending to encourage mismanagement of the corporation and to defeat or delay creditors.

Courts have generally placed no limitation on the right of directors of corporations to resign. *Blake v. Wheeler*, 18 Hun 496. Apparently the only authority on the question of resignation of all the directors in a body is *Smith v. Danzig*, 64 How. Prac. 320, where it was held that all the directors may resign when the affairs of the corporation are in a very bad condition in order that a receiver may be appointed and an equal distribution of the assets among creditors be secured. The present decision which seems inconsistent with *Smith v. Danzig*, *supra*, is supported by 1 *Moraw., Priv. Corp.* 563.

PUBLIC POLICY—CONDITION IN DEED—GRAIN ELEVATOR.—WAKEFIELD V. VAN TASSELL, 66 N. E. 830. (ILL.).—A condition in a deed of a small tract of land in a village, provided that no grain elevator should ever be erected thereon. *Held*, not to be void as against public policy, although it prohibited the building of a public warehouse.

The condition in question was urged to be contrary to public policy on the ground that it is for the interest of the public to encourage the building of public grain warehouses, as quasi-public agencies. Upon the ground that they are such agencies, agreements by railroad companies not to build a station within a certain distance of property granted to them, have been held to be against public policy. *R. R. Co. v. Ryan*, 11 Kan. 602; *Williamson v. R. R. Co.*, 53 Iowa 126. There seems, however, to be a clear distinction between the two classes of cases. The mere fact that a business is of public concern is not a sufficient reason for overthrowing reasonable restrictions upon its exercise within a limited area. *Chappel v. Brockway*, 21 Wend. 157.

RAILROADS—ACTIONS—VENUE.—BOYD v. BLUE RIDGE RY. CO., 43 S. E. 817 (S. C.)—*Held,* that an action may be brought against a railroad company in the county in which the president and assistant auditor have their offices, in the absence of evidence that its principal place of business is located elsewhere, though its charter provides that such place shall be in another city.

Whether the opinion holds with the weight of authority is doubtful. A certificate of incorporation specifying the location of the company's principal office is conclusive evidence of such location. *Pelton v. Transportation Co.,* 37 Ohio St. 450 The venue should be laid where the corporation resides, i.e. at its place of business. *Thorn v. Railroad Co.* 26 N. J. L. 121; *Transportation Co. v. Schen,* 19 N. Y. 408; *Railroad v. Cooper,* 30 Vt. 476. That the residence of a corporation is not confined to the county where its place of business is located, see *Rhodes v. Salem T. & C. B. Corp.,* 98 Mass. 95; *Mooney v. Union Pac. Ry. Co,.* 60 Ia. 346. See also *Elliott, Railroads,* Sec. 623, where the conflicting authorities are discussed.

TAXATION—LOCAL ASSESSMENT—LIABILITY OF SCHOOL DISTRICT.—CITY OF PITTSBURG v. STERRETT SUB-DISTRICT, 54 ATL. 463 (*PA.*).—*Held,* that an assessment for local improvements authorized by statute, on "any property or properties," could not be held to apply to property of a school district, it being public property and there being no provision for its enforcement.

That a constitutional exemption from "taxation" does not preclude liability for special assessments for local improvements is held by most of the states. *Ill. Cent. R. R. v. Decatur,* 147 U. S. 190; *Matter of Mayor, etc. of N. Y.,* 11 Johns. 77; *Cooley on Taxation,* 416; *Contra, County v. Boyd,* 70 Tex. 237; *Von Steen v. City of Beatrice,* 36 Neb. 421. Hence quasi-public corporations, charitable institutions, churches. etc., merely exempt from "taxation" are liable to such assessments. *Buffalo Cemetery v. Buffalo.* 40 N. Y. 506; *Lavickley M. E. Church's Appeal,* 165 Pa. 475; *Boston Seamen's Friend Soc. v. Boston,* 116 Mass. 181. The majority of the decisions however, support the present case in holding that though the state has the power to subject itself to assessments like the one in question, without violating a constitutional exemption from taxation—*Hassau v. City of Rochester,* 67 N. Y. 528—a contrary intention must be presumed. Hence the property of the state or of its subdivisions or agencies will not be liable under general assessment laws unless the intention to include such property be expressly mentioned or clearly implied. *State of Conn. v. Hartford,* 50 Conn. 89; *City of Clinton v. Henry County,* 115 Mo. 557; *Worcester County v. Worcester,* 116 Mass. 193; *Board of Improvement v. School Dist.,* 56 Ark. 354. The opposite view is held in Ohio, Iowa, Illinois and apparently in New York, *City of Cincinnati v. Board of Education,* 7 Ohio Dec. 362; *Sioux City v. School Dist.,* 55 Iowa 150; *McLean County v. Bloomington,* 106 Ill. 209; *Hassau v. City of Rochester,* 67 N. Y. 528.